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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,

Petitioner,

v.

WESTINGHOUSE AIR BRAKE COMPANY, A. KING McCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

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July 2, 1970

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This brief in opposition to the petition of Crane Company ("Crane") for a writ of certiorari is submitted on behalf of the ten individual respondents, defendants below.

Westinghouse Air Brake Company ("Air Brake"), the other defendant below and named here as a respondent, is no longer in existence as a separate entity, having been

merged into American Standard Inc. ("Standard") on June 7, 1968.

Standard and Blyth & Co., Inc. ("Blyth"), also named as respondents, were not parties to the suit which Crane seeks to pursue in this Court and they are not subject to that part of the order and judgment of the United States Court of Appeals for the Second Circuit for which review is sought.

Opinions Below

The opinion of the Court of Appeals is reported at 419 F. 2d 787 and reprinted as Appendix A to the petition. The opinion of the District Court is reported at CCH Fed. Sec. L. Rep. ¶ 92, 228 and reprinted as Appendix B to the petition. The opinion of the District Court denying Crane's motion for a preliminary injunction is unreported but is reprinted as Appendix C to the petition.

Jurisdiction

Crane invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1), but this Court in fact does not have jurisdiction because the petition was not filed within the time required by law.

The judgment of the Court of Appeals was entered on December 10, 1969. It affirmed the dismissal by the District Court of counts one and two of the consolidated complaint, on which Air Brake and the individual respondents herein were the defendants, and it reversed the dismissal of count three of the consolidated complaint, on which Standard and Blyth were the defendants. (Originally, counts one and two were in one complaint and count three was in a separate

complaint.) On December 24, 1969, Standard filed a petition for rehearing or rehearing *en banc* directed at that portion of the Circuit Court's judgment which pertained to count three. On March 4, 1970, the Court of Appeals denied that petition without opinion. Neither Crane nor Standard nor any other party took any action with respect to the Circuit Court's judgment as to counts one and two of the consolidated complaint. Thus, the judgment of the Court of Appeals with respect to those counts having become final on December 10, 1969, the last to petition for a writ of certiorari from such judgment was March 10, 1970. Crane however did not file its petition for a writ of certiorari until June 2, 1970. This was not timely, as is shown in part I of our argument.

Counterstatement of Questions Presented

Questions 1 and 2 stated in Crane's petition assume the existence of facts which both courts below determined were unfounded assertions. Question 3 is premised upon a factual contention which was not even asserted below and which has no support in the record. Hence, in asking this Court to determine whether certain "facts" were material and should have been disclosed in a proxy statement, Crane has presented hypothetical questions that are not properly before this Court.

We submit that the only questions properly before this Court are:

1. Did the filing by Standard of a petition for rehearing of the decision below on the one count to which it was a defendant toll the statutory time period within which petitioner could seek a writ of certiorari with respect to the decision below on the two other counts, which related only to other defendants?

2. Are the concurrent findings of the courts below that the Air Brake proxy statement did not falsely state the reasons for the recommendation of the merger with Standard subject to further review?

Statement

This litigation has its origin in an attempt by Crane to take over Air Brake, and to thwart a merger agreed upon by Air Brake and Standard.

During the latter part of 1967, Crane secretly acquired nearly 10% of Air Brake's outstanding stock and then proposed to the Air Brake management a merger of the two companies. Air Brake's management studied and refused Crane's proposition (R. 54, pp. 188-210).* Crane then embarked upon a program to increase its holdings of Air Brake shares. Initially it purchased shares on the stock exchange, and then by means of a public offer to exchange Air Brake stock for Crane debentures. By mid-April, Crane held about 15% of Air Brake's stock and by the end of May had increased its holdings to approximately 32% (Ex. 1, 1-A).

During the course of Crane's intensive buying campaign, on March 4, 1968, Air Brake announced that it had entered into an agreement to merge into Standard. This agreement was subject to the approval by a majority of the stockholders of each company at meetings to be held on May 16.

Crane mailed its tender offer to Air Brake shareholders during the week of April 8, 1968, the same week in which Air Brake mailed its proxy statement soliciting proxies in favor of the proposed merger with Standard. In addition to pursuing its takeover attempt by means of the tender offer, Crane sought to defeat the Standard merger by solicitation of proxies in opposition to the merger.

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*The Record on Appeal is cited "R.—".

Crane failed to acquire a majority interest through its purchasing program and tender offer. It also failed to convince the independent Air Brake stockholders to defeat the Standard merger; the independent stockholders voted overwhelmingly in favor of the merger, and very few shares of Air Brake not owned by Crane itself were voted against the merger (Ex. G). Upon the filing of the requisite papers, the merger became effective at the close of business on June 7, 1968.

Prior to the May 16, 1968, meeting of Air Brake stockholders, Crane instituted two actions in the Southern District of New York in which it sought to prevent the merger.

The present petition arises out of the first of those actions, which was commenced by Crane on April 17, 1968 (No. 68 Civ. 1560). Crane alleged in that complaint that Air Brake's proxy statement issued for the stockholders' meeting called to approve the merger was false and misleading and in violation of Sections 14(a) and 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78n(a), 78j(b), and of Regulation 14A and Rule 10b-5 thereunder (R. 1, para. 1). The defendants in the first action were Air Brake and the members of its board of directors (hereinafter referred to as the "proxy defendants"). Messrs. Lord, Day & Lord were attorneys for Crane.

Crane commenced the second action on May 6, 1968 (No. 68 Civ. 1845). In that action, Crane charged that Standard and Blyth had manipulated the price of Air Brake stock on the New York Stock Exchange on April 19, 1968, in violation of Section 10(b) of the Act of 1934 and Rules 10b-5 and 10b-6 thereunder (R. 58, para. 19). Crane further alleged that *Standard*, not Air Brake, failed to disclose the details of its manipulative transactions in the Air Brake proxy statement in violation of Section 14(a) of the 1934 Act and of Regulation 14A thereunder (R. 58, para. 18). Messrs. Pomerantz, Levy, Haudek & Block were attorneys for Crane in the second action.

The two actions were consolidated on May 9, 1968, so that the District Court could try promptly all disputes concerning the Air Brake stockholders' meeting scheduled for the following week. The causes of action asserted against the proxy defendants became counts one and two of a consolidated complaint and the manipulation claim against Standard and Blyth became count three. Although tried together, the two actions retained their separate identities on the dockets of both the District Court and the Court of Appeals and all papers bore both the original captions. (E.g., App. B hereto.)

The trial began on May 21, while the stockholders' meeting was adjourned to count proxies. Crane's motion to preliminarily enjoin the meeting was denied by the Court on May 31 (Pet. pp. 49a-56a). Thereafter, on June 3, the trial was completed and the District Court delivered its opinion directing that both actions be dismissed on the merits.

In its opinion, the District Court made the following relevant findings, among others:

> (a) Crane failed to prove that one of the reasons why the Air Brake management recommended the merger was to forestall Crane from acquiring control of Air Brake and to ensure the continuance of Air Brake's management (Pet. p. 41a).
>
> (b) There was no evidence of improper motives on the part of Air Brake's management (*Id.*, p. 47a).
>
> (c) Crane's attempted takeover of Air Brake and the expectation that Air Brake's management would continue to be employed after the merger were clearly set forth in Air Brake's proxy statement (*Id.*, pp. 41a-42a).
>
> (d) All of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders (*Id.*, p. 42a).

Crane filed four separate appeals, two each against the proxy defendants and Standard and Blyth from both the final judgment and the earlier order denying a preliminary injunction. On December 10, 1969, the Court of Appeals rendered its judgment affirming the dismissal by the District Court of the action against the proxy defendants and reversing the District Court's dismissal of the action against Standard. The Court of Appeals found that Standard's transactions in Air Brake stock on April 19 were in violation of Sections 9(a)(2) and 10(b) of the 1934 Act (Pet. p. 20a), and it remanded the action against Standard and Blyth based on market manipulation and deception for a determination of the appropriate remedy (*Id.*, p. 30a).

With respect to the Air Brake proxy statement and the actions of the Air Brake directors, however, the Court of Appeals unanimously affirmed the findings of the District Court. Among the findings of the Circuit Court relevant herein were the following:

(a) The proxy statement accurately reported that the Air Brake directors had given due consideration to the merger (Pet. pp. 26a-29a).

(b) Crane's allegation did not establish that the Air Brake directors had practiced a deception upon the corporation or that they had failed to exercise the care required of them as fiduciaries (*Id.*, pp. 28a-29a).

(c) The Air Brake directors were not without a reasonable basis in fact for recommending the merger with Standard (*Id.*, p. 29a).

(d) There were no improper motives underlying the action of the Air Brake directors, and the proxy statement fairly set forth the relevant facts (*Ibid.*).

(e) The Air Brake directors did not breach their duty of disclosure with regard to the proxy statement (Pet. p. 30a).

On December 24, 1969, Standard filed a petition for rehearing or rehearing *en banc* directed at that portion of the Circuit Court's judgment which reversed the lower court's dismissal of Crane's second action.* In its petition, Standard asked the Court to reconsider its decision that Standard had been guilty of manipulating the market price of Air Brake stock. The petition was denied without opinion on March 4, 1970. On June 2, 1970, Crane filed its petition for a writ of certiorari to review its claims that the proxy defendants had distributed a misleading proxy statement.

Argument

I

THE PETITION FOR A WRIT OF CERTIORARI WAS FILED TOO LATE TO GIVE THIS COURT JURISDICTION.

The Court of Appeals affirmed the judgment of the District Court dismissing the action against the proxy defendants on December 10, 1969. Almost six months later, petitioner filed for a writ of certiorari. A petition for a writ of certiorari must be filed within 90 days. 28 U. S. C. § 2101(c). If it is not, this Court does not have jurisdiction. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923).

Petitioner relies—erroneously—upon a petition for rehearing filed by Standard which was denied on March 4, 1970 (Pet. p. 2). A timely petition for rehearing may extend

*Standard's petition for rehearing is printed in Appendix A to this brief. The orders denying rehearing and rehearing en banc are printed as Appendix B.

the time for other parties to seek review where such petition "operates to suspend the finality of the [lower] court's judgment, pending the court's determination whether the judgment should be modified as to alter its adjudication of the rights of the parties". *Department of Banking* v. *Pink, supra*, 317 U. S. at 266. Petitioner wholly fails to note, however, that Standard's petition for rehearing was limited to the decision on the case against Standard and did not and could not affect in any way the finality of the decision on the case against the proxy defendants which petitioner now seeks to review. Standard's petition for rehearing sought review only "insofar as that decision finds that Standard violated Section 9(a)(2) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC". (App. A hereto, p. 1a.) Standard's petition for rehearing sought no alteration of the other part of the decision—the part affirming the dismissal of petitioner's claim against the proxy defendants—which petitioner now seeks to review. That part was left to stand undisturbed.

Where a petition for rehearing or other postjudgment motion does not "suspend the finality" of a court's adjudication and cannot disturb the issues to be presented on appeal, a petition for rehearing or other motion will not toll the statutory time limitation. *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211, 213 (1952).

> "[W]e cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari. . . . [Litigants] must take heed of . . . the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate

> jurisdiction. . . . Those statutes are not to be applied so as to admit a tolling of the time limitation because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." 344 U. S. at 211, 213.

If a petition or motion by a party with respect to one of several issues does not extend the time for a party to petition for certiorari with respect to other issues involving the same defendant, as in *Minneapolis-Honeywell, a fortiori* it does not extend the time to petition on different issues involving different defendants.

The petition herein was not filed within 90 days after entry of the judgment sought to be reviewed, as required by 28 U. S. C. § 2101(c), and should be dismissed for want of jurisdiction. *Dept. of Banking* v. *Pink, supra; F. T. C.* v. *Minneapolis-Honeywell Co., supra.*

Although issues that are sought to be reargued by one defendant may be so "inextricably linked" with issues to be appealed that rehearing of the former may toll the time to petition for certiorari as to the latter, *cf. United States* v. *Adams*, 383 U. S. 39, 41-42 (1966), that is not the case here. Petitioner's claims were against different parties and on different grounds. One was against Standard and Blyth for market manipulation, and the other was against Air Brake and its directors for a false and misleading proxy statement. These two different claims were accordingly separately presented and decided below, the Court of Appeals dealing separately in its opinion with the claim against Standard (Pet. pp. 5a-20a) and the claim against Air Brake and its directors (Pet. pp. 20a-30a). The Court of Appeals holding that Standard had violated section 9(a)(2) of the Securities Exchange Act and Rule 10b-5 of the SEC in its purchases and sales of Air Brake stock,

and Standard's request for rehearing with respect thereto, could not have affected that Court's holding that "the directors [of Air Brake] did not breach their duty of disclosure with regard to the proxy statement". (Pet. p. 30a). Standard's petition for rehearing of the part of the decision adverse to it involved only petitioner's claim against Standard and Blyth; it was thus "of no import to the matters to be dealt with on review"—the part of the decision adverse to petitioner on its claim against the proxy defendants—and it did not toll the time for petitioner to seek review: *F. T. C. v. Minneapolis-Honeywell Co., supra*, 344 U. S. at 213.

In order to avoid a jurisdictional defect, petitoner has attempted to link the issue on rehearing with its presentation of the issues before this Court by raising the question whether the Air Brake directors should have disclosed in the proxy statement that Standard had manipulated the market price of Air Brake stock (Pet. p. 3). In its complaint in the second action (No. 68 Civ. 1845), petitioner charged that Standard should have made that disclosure in the Air Brake proxy statement on the theory that Standard was unlawfully soliciting Air Brake proxies (R. 58, paras. 14 and 18). The complaint against the proxy defendants does not even refer to the manipulation claim. There is no proof that the proxy defendants had any complicity in or knowledge of the market manipulation. The record in the District Court shows that no such proof was offered and that no such allegation was made.

On appeal, although petitioner pursued its claim that the Air Brake proxy statement should have made the disclosure concerning the market manipulation, petitioner did not indicate that it was departing from its contention below that the duty of disclosure was Standard's. Petitioner did not state that the proxy defendants should have made that disclosure, nor did it allege that the proxy defendants took

any part in the manipulative transactions.* Consequently, the question of Air Brake's participation in and responsibility for the market manipulation, the only link of any kind between the issue on rehearing and the present appeal, was raised for the first time in the petition and is not properly before this Court. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327 (1945); *United States* v. *Classic*, 313 U. S. 299 (1941).

Petitioner could have protected itself against the time requirements of 28 U. S. C. § 2101(c) in several ways. It could have filed its own petition for rehearing. It could have filed a petition for certiorari within 90 days after the December 10, 1969, judgment. It could have applied for a 60-day extension of time because of the pendency of Standard's petition for rehearing.** But it did none of these things. The petition should therefore be dismissed in accordance with the statute limiting the appellate jurisdiction of this Court "to those cases where review is sought within a prescribed period". *F. T. C.* v. *Minneapolis-Honeywell Co.*, *supra*, 344 U. S. at 213.

II

THE COURT OF APPEALS HOLDING THAT AIR BRAKE'S PROXY STATEMENT WAS NEITHER FALSE NOR MISLEADING DOES NOT PRESENT ANY QUESTION FOR REVIEW BY THIS COURT.

A. Although petitioner purports to seek review only of questions of law, it predicates those questions on facts which are contrary to those found by the courts below.

*Crane's brief in the Court of Appeals does contain a conclusory allegation that Air Brake knew about the manipulative inflation of the price of Air Brake stock, but fails to refer to any portion of the record in support of that allegation (Crane brief, p. 78). Such an unfounded allegation hardly can be considered to have raised the question whether the proxy defendants acted in concert with Standard.

**The original 90-day period did not expire until March 10, 1970, which was six days after Standard's petition for rehearing was denied on March 4.

In so doing, petitioner is in effect seeking review of the fundamental factual question decided twice below, *i.e.*, whether Air Brake's proxy statement falsely stated the individual defendants' reasons for recommending the Air Brake-Standard merger. Both the District Court and the Court of Appeals answered that question in the negative.* This Court has repeatedly stated that it." 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' *E.g., Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275." *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635 (1967). Petitioner has not asserted that any such error was committed by the courts below and, therefore, their findings of fact are not subject to further review. Moreover, resolution of the narrow factual question decided below does not involve any question of general applicability which would merit review by this Court.

B. The decision of the Court of Appeals is not in conflict with this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970). Petitioner purports to find a conflict in two definitions of "material fact" as that phrase is used in Rule 14a-9. Even if such a conflict were to exist, and it does not, it would be irrelevant to this action. The question of whether a fact is or is not material arises only if the proxy statement contains a fact which is false or fails to set forth a fact. Both courts below found as a matter of fact that there were no false statements or omissions in the Air Brake proxy statement relating to the individual defendants' reasons for recommending the merger. Thus the Court below did not reach the question of whether certain facts relating to the merger were or were not material. The question of whether a fact is material if it "might" be considered important by a stockholder or only

*See pp. 6-8 *supra*.

if it "would" influence the stockholder's vote is, therefore, wholly academic and not properly before this Court.

In any event, there is no conflict between this Court's decision in *Mills* and the decision below. In the decision below the Court of Appeals referred to a "material fact" as a fact "that would influence the stockholder's vote" (Pet. p. 21a). In *Mills*, this Court did not define the phrase "material fact". Rather, the Court had before it the question of "what causal relationship must be shown between . . . a [materially false or misleading proxy] statement and . . . [a] merger to establish a cause of action . . ." (396 U. S. at 377). This Court concluded that causation is established if the material falsity "might" have been considered important by a reasonable shareholder and stated that a finding of material falsity undoubtedly embodies a conclusion that the fact "might" have been considered important. However, in concluding that *causation* is established if a material fact might have been considered important by a shareholder, this Court did not suggest that a fact becomes material merely because it "might" have been considered important.

C. The petition does not properly raise the question of whether a proxy statement must expressly state that a merger is being recommended for the purpose of preventing a takeover by another company. The District Court held that plaintiff failed to establish its contention that a reason for the Air Brake-Standard merger was to forestall Crane from acquiring Air Brake. (Pet. p. 41a). That finding was not disturbed by the Court of Appeals (*Id.*, p. 29a). Thus the question which the petition purports to raise is merely a hypothetical one which is not properly before this Court.

D. The question of whether the Air Brake proxy statement should have disclosed that the market price of Air

Brake stock was allegedly manipulated on April 19, 1968, similarly is not properly before this Court for the reasons set forth at pp. 11-12 above.

CONCLUSION

For the foregoing reasons Crane's petition for a writ of certiorari should be denied.

July 2, 1970

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